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SUPREME COURT, U.S.

60pcp

No. 06-939

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

EDMUND G. BROWN, JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, preempts a California law that prohibits private employers that receive state grant and program funds from using those funds "to assist, promote, or deter union organizing," Cal. Gov't Code §§ 16645.2, 16645.7 (West Supp. 2008).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 9
Argument:
The NLRA preempts California's statute prohibiting employers from using state grant and program funds to express views regarding unionization 11
A. A.B. 1889 is preempted under *Machinists* because it regulates employer speech that Congress intended be left unregulated 11
1. The NLRA leaves unregulated most employer speech during organizing campaigns 12
2. A.B. 1889 is preempted because it restricts employer speech that Congress intended be left unregulated 14
3. The court of appeals' proffered grounds for distinguishing *Machinists* are unpersuasive ... 16
B. A.B. 1889 is preempted under *Garmon* because it regulates speech prohibited under the NLRA and intrudes on the Board's exclusive primary jurisdiction 21
1. The NLRA prohibits certain speech and entrusts enforcement of that prohibition to the Board 21
2. A.B. 1889 is preempted because it interferes with the Board's jurisdiction over coercive or prejudicial employer speech regarding unionization 23
3. The court of appeals' proffered grounds for distinguishing *Garmon* are unpersuasive 26

Table of Contents—Continued: Page

C. The State's use of its spending power does not save A.B. 1889 from preemption 28
1. California is not acting as a "market participant" 29
2. A.B. 1889 is not saved from preemption as a state effort to fund only a particular program .. 32
Conclusion 35
Statutory Appendix 1a

TABLE OF AUTHORITIES

Cases:

Bendix Autolite Corp. v. *Midwesco Enters., Inc.*, 486 U.S. 888 (1988) 28
Boire v. *Greyhound Corp.*, 376 U.S. 473 (1964) 2
Building & Constr. Trades Council v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) 4, 16, 29, 31
Children's Ctr. for Behavioral Dev., 347 N.L.R.B. No. 3 (May 15, 2006) 13
Coamo Knitting Mills, Inc., 150 N.L.R.B. 579 (1964) ... 13
Dana Corp., 351 N.L.R.B. No. 28 (Sept. 29, 2007) 3
De Veau v. *Braisted*, 363 U.S. 144 (1960) 20
Farmer v. *United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977) 27
Garner v. *Teamsters, Local Union No. 776*, 346 U.S. 485 (1953) 2, 18
General Shoe Corp., 77 N.L.R.B. 124 (1948) 22, 24
Golden State Transit Corp. v. *City of L.A.*, 475 U.S. 608 (1986) 20

Cases—Continued: Page

Healthcare Ass'n of N.Y. State, Inc. v. *Pataki*, 471 F.3d 87 (2d Cir. 2006) 12
International Union, UAW v. *Russell*, 356 U.S. 634 (1958) 27
Letz Mfg. Co., 32 N.L.R.B. 563 (1941) 3
Linden Lumber Div., Summer & Co. v. *NLRB*, 419 U.S. 301 (1974) 5
Linn v. *United Plant Guard Worker, Local 114*, 383 U.S. 53 (1966) ..... *passim*
Local 926, Int'l Union of Operating Eng'rs v. *Jones*, 460 U.S. 669 (1983) 28
Lodge 76, Int'l Ass'n of Machinists v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) ..... *passim*
Metropolitan Life Ins. Co. v. *Massachusetts*, 471 U.S. 724 (1985) 4
Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982) ... 13
Michem, Inc., 170 N.L.R.B. 362 (1968) 22
NLRB v. *A.J. Tower Co.*, 329 U.S. 324 (1946) 23
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) 3, 12, 13, 22, 24, 26
NLRB v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) 18
NLRB v. *Katz*, 369 U.S. 736 (1962) 12
NLRB v. *Lenkurt Elec. Co.*, 438 F.2d 1102 (9th Cir. 1971) 12
NLRB v. *Magnavox*, 415 U.S. 322 (1964) 14
NLRB v. *Nash-Finch Co.*, 404 U.S. 138 (1971) 33

Cases—Continued: Page

NLRB v. *Virginia Elec. & Power Co.*, 314 U.S. 469 (1941) 3
Nash v. *Florida Indus. Comm'n*, 389 U.S. 235 (1967) ... 11
National By-Prods., Inc. v. *NLRB*, 931 F.2d 445 (7th Cir. 1991) 24
New York Tel. Co. v. *New York State Dep't of Labor*, 440 U.S. 519 (1979) 26
Peerless Plywood Co., 107 N.L.R.B. 427 (1953) 22
Rust v. *Sullivan*, 500 U.S. 173 (1991) 33, 34
San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) ..... *passim*
Sears, Roebuck & Co. v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) 27, 28
Smithfield Foods, Inc., 347 N.L.R.B. No. 109 (Aug. 31, 2006), aff'd *sub nom. UFCW Local 204* v. *NLRB*, 506 F.3d 1078 (D.C. Cir. 2007) 13
Stewart-Warner Corp., 102 N.L.R.B. 1153 (1953) 13
TNT Logistics N. Am., Inc., 345 N.L.R.B. No. 21 (Aug. 26, 2005) 13
Trent Tube Co., 147 N.L.R.B. 538 (1964) 13, 24
Tri-Cast, Inc., 274 N.L.R.B. 377 (1985) 12
United States v. *Palumbo Bros.*, 145 F.3d 850 (7th Cir.), cert. denied, 525 U.S. 949 (1998) 2
Wisconsin Dep't of Indus. v. *Gould Inc.*, 475 U.S. 282 (1986) ..... *passim*
Youngdahl v. *Rainfair, Inc.*, 355 U.S. 131 (1957) 27

Constitution and statutes: Page

U.S. Const.:
Art. VI, Cl. 2 19
Amend. I 33
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
29 U.S.C. 153-154 2
29 U.S.C. 157 2
29 U.S.C. 158 2
29 U.S.C. 158(a)(1) 21
29 U.S.C. 158(b)(4) 18
29 U.S.C. 158(c) 3, 21, 24
29 U.S.C. 159 ..... 2, 22
29 U.S.C. 159(c) 3, 30
29 U.S.C. 159(e) 3, 30
29 U.S.C. 160 ..... 2, 26
29 U.S.C. 160(a) 22
Head Start Act, 42 U.S.C. 9831 *et seq.*:
42 U.S.C. 9833-9834 20
42 U.S.C. 9835 (2000 & Supp. IV 2004) 20
42 U.S.C. 9839 (2000 & Supp. IV 2004) 20
42 U.S.C. 9840 20
Medicare Act, 42 U.S.C. 1395 *et seq.*:
42 U.S.C. 1395d (2000 & Supp. IV 2004) 20
42 U.S.C. 1395e 20
42 U.S.C. 1395f-1395g (2000 & Supp. IV 2004) 20
42 U.S.C. 1395k 20
42 U.S.C. 1395*l*-1395n (2000 & Supp. IV 2004) 20
42 U.S.C. 1395x(v) (2000 & Supp. IV 2004) 20

Statutes—Continued: Page

National and Community Service Act of 1990, 42 U.S.C. 12501 *et seq.*:
42 U.S.C. 12521-12526 20
42 U.S.C. 12530 20
42 U.S.C. 12571-12576 20
42 U.S.C. 12584(a) 20
42 U.S.C. 12634 20
Workforce Investment Act of 1998, 29 U.S.C. 2801 *et seq.*:
29 U.S.C. 2852 20
29 U.S.C. 2854(b)(4) 20
29 U.S.C. 2854(c)(6)(B) 20
29 U.S.C. 2854(c)(6)(C) 20
29 U.S.C. 2864 20
29 U.S.C. 2931(b)(7) 20
29 U.S.C. 2931(c) 20
29 U.S.C. 2931(d)(1) 20
29 U.S.C. 2931(d)(2) 20
29 U.S.C. 2931(e) 20
29 U.S.C. 2938(a)(3) 20
Cal. Gov't Code (West Supp. 2008):
§§ 16645-16649 ..... 4, 5
§ 16645(a) 5
§ 16645(a)(1) 14
§ 16645.2 ..... 10, 17, 23
§ 16645.2(a) 6
§ 16645.2(c) 6

Statutes—Continued: Page

§ 16645.2(d) 6, 14, 24
§ 16645.7 ..... 10, 17, 23
§ 16645.7(a) 6
§ 16645.7(b) 6
§ 16645.7(c) 6
§ 16645.7(d) 6, 14, 24
§ 16645.8 ..... 6, 14, 17, 23, 24
§ 16646(a) 5
§ 16646(b) 6
§ 16647 21
§ 16647(d) 5, 15, 30
Cal. Welf. & Inst. Code (West Supp. 2007):
§ 14126.02 6
§ 14126.023 6
2000 Cal. Stat. ch. 872, § 1 ..... 5, 10, 14, 23, 24, 29

Miscellaneous:

93 Cong. Rec. 4143 (1947) 15
California Dep't of Health Care Servs.:
Medi-Cal Rates Information (visited Jan. 16, 2008) <http://files.medi-cal.ca.gov/pubsloco/rates/rateshome.asp> 6
Methods and Standards for Establishing Facility-Specific Reimbursement Rates (Aug. 1, 2005) <www.dhs.ca.gov/mcs/mcpd/RDB/LTCSDU/pdfs/SPA%2004012%202105. pdf> 6
S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 3, 12

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INTEREST OF THE UNITED STATES

This case concerns the preemptive scope of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* The National Labor Relations Board (Board) has primary authority for interpreting and administering the NLRA to ensure uniform application of national labor relations policy. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Congress enacted the NLRA to "create a national, uniform body of labor law and policy, to protect

the stability of the collective bargaining process, and to maintain peaceful industrial relations." *United States* v. *Palumbo Bros.*, 145 F.3d 850, 861 (7th Cir.), cert. denied, 525 U.S. 949 (1998). To accomplish those goals, Congress established an integrated scheme of rights, protections, and prohibitions governing employee, employer, and union conduct during organizing campaigns, representation elections, and collective bargaining. Congress also created a centralized administrative agency, the Board, to interpret and administer the NLRA and to resolve labor disputes. See 29 U.S.C. 153-154, 160; *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953).

The NLRA protects employees' rights to join or to decline to join a union, and it provides a mechanism for peacefully and expeditiously resolving questions concerning union representation. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479 (1964). Section 7 of the NLRA sets forth the core rights of employees "to self-organization"; "to form, join, or assist labor organizations"; "to bargain collectively"; and "to engage in other concerted activities"; as well as the right "to refrain from any or all of such activities." 29 U.S.C. 157. Section 8 defines and prohibits union and employer "unfair labor practices" that infringe on employees' Section 7 rights, 29 U.S.C. 158, and Section 10 authorizes the Board to adjudicate unfair labor practice claims, see 29 U.S.C. 160.

Section 9 authorizes the Board to regulate representation elections. It sets forth procedures for determining whether a majority of employees in an appropriate bargaining unit desire to exercise their rights to bargain collectively and for certifying election results. 29 U.S.C. 159. Pursuant to Section 9, the Board has determined

that a secret-ballot election is the preferred method for resolving representational disputes because it best protects employee free choice. See 29 U.S.C. 159(c) and (e); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *Dana Corp.*, 351 N.L.R.B. No. 28 (Sept. 29, 2007), slip op. 5-7.

The NLRA encourages the free flow of information from both unions and employers to employees as they consider whether to be represented by a union. Although the Board initially took the position that Section 8 of the NLRA demanded complete employer neutrality during organizing campaigns, see, *e.g.*, *Letz Mfg. Co.*, 32 N.L.R.B. 563, 571-572 (1941), this Court held that Section 8 prohibits only coercive employer speech, see *NLRB* v. *Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941). Congress then amended the NLRA to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters." S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947). In particular, Congress added Section 8(c), which provides: "The expressing of any views, argument, or opinion, or the dissemination thereof * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 158(c). Section 8(c) thus "manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966).

b. "[I]n passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Indus.* v. *Gould Inc.*, 475 U.S. 282, 286 (1986) (*Gould*). The NLRA's regulatory scheme combines prescriptive rules prohibiting or requiring certain

conduct and market freedom rules defining areas left unregulated for policy reasons. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 748-749 (1985). This Court has recognized distinct NLRA preemption principles to reflect both features of the statutory scheme.

The first principle—enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) (*Garmon* preemption)—is that States may not regulate "activity that the NLRA protects, prohibits, or arguably protects or prohibits," because "'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity.'" *Gould*, 475 U.S. at 286 (citation omitted); see *Garmon*, 359 U.S. at 244. *Garmon* preemption preserves the jurisdiction of the Board by precluding States from regulating the same conduct that Congress intended the Board to regulate under uniform national law. *Garmon*, 359 U.S. at 242-244; see *Gould*, 475 U.S. at 286.

The second principle—recognized in *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists* preemption)—is that States may not regulate conduct that "Congress intended * * * 'to be controlled by the free play of economic forces.'" *Id.* at 140 (citation omitted). *Machinists* preemption preserves Congress's "intentional balance between the uncontrolled power of management and labor to further their respective interests." *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226 (1993) (*Boston Harbor*) (internal quotation marks omitted).

2. In September 2000, California enacted Assembly Bill No. 1889, Cal. Gov't Code §§ 16645-16649 (A.B.

1889),[1] which prohibits entities that receive state funds from using the funds to "assist, promote, or deter union organizing." The statute's stated "policy" is to prevent "interfere[nce] with an employee's choice about whether to join or to be represented by a labor union" by "prohibit[ing] an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization." 2000 Cal. Stat. ch. 872, § 1.

The prohibition on "assist[ing], promot[ing], or deter[ring] union organizing" is expansively defined to include "*any* attempt by an employer to influence the decision of its employees" regarding "[w]hether to support or oppose a labor organization" or "[w]hether to become a member of any labor organization." Cal. Gov't Code § 16645(a) (emphasis added). The statute's spending restriction applies to "*any* expense, including legal and consulting fees and salaries of supervisors and employees, incurred for * * * an activity to assist, promote, or deter union organizing." *Id.* § 16646(a) (emphasis added). A.B. 1889 exempts certain categories of labor relations expenses from its broad prohibition, including expenses incurred in "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization," *i.e.*, expenses incurred in agreeing to recognize a union without a secret-ballot election. *Id.* § 16647(d); see *Linden Lumber Div., Summer & Co.* v. *NLRB*, 419 U.S. 301, 309-310 (1974).

A.B. 1889 contains extensive compliance and enforcement provisions. Entities that receive state funds must "provide a certification to the state that none of the

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[1] Unless otherwise noted, all citations to Cal. Gov't Code §§ 16645-16649 are to the 2008 supplement.

funds will be used" for prohibited expenditures, Cal. Gov't Code §§ 16645.2(c), 16645.7(b). Moreover, the statute places the burden on recipients to "maintain records sufficient to show that no state funds were used" for prohibited expenditures, *id.* §§ 16645.2(c), 16645.7(c), and conclusively presumes that any expenditure to assist, promote, or deter union organizing made from commingled funds constitutes a violation of the statute, *id.* § 16646(b). Suspected violators may be sued by the state Attorney General or any private taxpayer for injunctive relief, mandatory damages and civil penalties, attorney's fees, and costs. See *id.* §§ 16645.2(d), 16645.7(d), 16645.8.

At issue here are the portions of A.B. 1889 regulating spending by any private employer that receives either "a grant of state funds," Cal. Gov't Code § 16645.2(a), or more than $10,000 per year "on account of its participation in a state program," *id.* § 16645.7(a). One "program" at issue is Medi-Cal, California's Medicaid program of health benefits coverage for low-income individuals, under which participating healthcare providers receive state funds as "reimbursement for services provided to beneficiaries." J.A. 110-111, 129-131; see, *e.g.*, California Dep't of Health Care Servs. (DHCS), *Medi-Cal Rates Information* (visited Jan. 16, 2008) <http://files.medi-cal.ca.gov/pubsdoco/rates/rateshome.asp> (listing reimbursement rates for various medical procedures). For example, long-term-care providers regularly submit reports of "allowable costs" to the State, which sets Medi-Cal reimbursement rates (generally a fixed amount per day per beneficiary) relying in part on those cost reports. See J.A. 244-245, 248-255; see also Cal. Welf. & Inst. Code §§ 14126.02, 14126.023 (West Supp. 2007); see generally DHCS, *Methods and Stan-*

dards for Establishing Facility-Specific Reimbursement Rates (Aug. 1, 2005) <www.dhs.ca.gov/mcs/mcpd/RDB/LTCSDU/pdfs/SPA%2004012%202105.pdf>. Under the Medi-Cal program, "allowable costs do not include expenditures to assist, promote, or deter union organizing to the extent such expenditures are paid by the provider with State funds." J.A. 244-245; see J.A. 248-251. A.B. 1889 supplements that restriction by "regulat[ing] the manner in which Medi-Cal providers may spend state funds" once they have received those funds from the State as payment for services rendered. J.A. 331-332; see J.A. 323-324.

3. Petitioners challenged A.B. 1889 in federal district court, alleging that the statute is preempted by the NLRA under both *Machinists* and *Garmon*. The district court granted summary judgment for petitioners. Pet. App. 140a-149a. It held that A.B. 1889's restrictions on grant and program funds are preempted under *Machinists* because the NLRA "manifests a congressional intent to encourage free debate on issues dividing labor and management," *id.* at 146a (quoting *Linn*, 383 U.S. at 62), and A.B. 1889 "prevent[s] this free debate" by "regulat[ing] employer speech about union organizing," *id.* at 147a. The court rejected respondents' contention that A.B. 1889 is a permissible means of "controlling the use of state funds" as a "'market participant,'" because the statute is "a traditional legislative enactment, not a proprietary act." *Id.* at 147a-148a (citation omitted).

4. a. A panel of the court of appeals affirmed, both in an initial opinion, Pet. App. 114a-139a, and in a second opinion after granting panel rehearing, *id.* at 58a-113a. The court of appeals then granted en banc review and reversed and remanded. *Id.* at 1a-57a.

At the outset, the en banc court rejected respondents' argument that A.B. 1889 is proprietary, rather than regulatory, in nature. Pet. App. 7a-12a. The court noted that "[t]he statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services"; instead, it indicates "a general state position of neutrality with regard to organizing" and a desire to impact "an employer's attempt to influence employee choice about whether to join a union." *Id.* at 11a-12a.

Despite A.B. 1889's regulatory purpose, the court of appeals concluded that the statute's grant and program restrictions "do not undermine federal labor policy." Pet. App. 3a. The court held that *Machinists* preemption does not apply because employer speech regarding union organizing is not free from "*all* regulation." *Id.* at 19a-21a. The court also found that A.B. 1889 "do[es] not interfere" with an employer's ability to speak to employees during organizing campaigns because "an employer has and retains the freedom to spend its own funds however it wishes." *Id.* at 17a.

The court found *Garmon* preemption inapplicable as well, reasoning that while Section 8(c) "prohibits sanctioning employers" for "exercis[ing] speech rights," it "does not *grant* employers speech rights." Pet. App. 23a. The court also decided that there was "no potential overlap between the [Board's] jurisdiction and that of a state court hearing a suit brought under AB 1889," *id.* at 29a-30a, and that, in any event, California's substantial interest "in determining how the recipients of state grant and program funds use those funds" saves A.B. 1889 from preemption. *Id.* at 30a.

b. Three judges dissented. They explained that "AB 1889 prohibits not just the use of state money granted to

an employer for and under a specific program"; it also restricts how state funds may be used even after an employer has "fully performed" its obligation to the State and the funds "can no longer be considered 'state funds.'" Pet. App. 36a-39a (Beezer, J., dissenting). They concluded that A.B. 1889 is preempted under *Machinists* because the NLRA generally "takes a *laissez faire* approach to employee and employer speech, allowing passionate, partisan debate * * * during a union organizing campaign," and A.B. 1889 interferes with that unregulated zone. *Id.* at 48a-49a, 53a. And they found A.B. 1889 preempted under *Garmon* because it "stifles employer speech rights" that are protected by Section 8(c) of the NLRA and guarded by the Board. *Id.* at 51a, 53a.

SUMMARY OF ARGUMENT

The NLRA establishes a comprehensive, nationally uniform scheme for ensuring efficient and fair representation elections. Congress has determined that both unions and employers should be permitted wide berth to speak with employees about the advantages and disadvantages of unionization in order to enhance employee free choice and foster fair representation elections, and it made that policy choice explicit in Section 8(c) of the NLRA. At the same time, Congress recognized that union and employer speech may be regulated in limited circumstances, and it entrusted that regulation to the Board.

A.B. 1889 intrudes on that comprehensive federal scheme by penalizing employers who speak about unionization. It broadly prohibits any employers that receive state grant or program funds from using such funds to "assist, promote, or deter union organizing," Cal. Gov't

Code §§ 16645.2, 16645.7, based on the State's expressly stated view that employer speech "interfere[s] with an employee's choice about whether to join or to be represented by a labor union," 2000 Cal. Stat. ch. 872, § 1. That policy judgment is directly contrary to Congress's judgment in the NLRA that robust employer speech enhances employee choice and contributes to fair elections. Because it penalizes speech that Congress intended be left unregulated, A.B. 1889 is preempted under *Machinists*. Further, because it intrudes upon the Board's generally exclusive jurisdiction to define the contours of speech that may be regulated, A.B. 1889 is preempted under *Garmon*.

A.B. 1889 is not saved from preemption merely because the State has regulated using its spending power. As the court of appeals correctly noted, A.B. 1889 is plainly regulatory in nature, and its broad scope and punitive enforcement provisions make clear it cannot be justified as the act of a "market participant." Although a State may choose to purchase only certain products or services or fund only a particular message, it may not use its spending power to implement its own labor relations policy, which is precisely what California has attempted here.

The comprehensiveness and exclusivity of the federal scheme are clear. A.B. 1889 poses a serious threat to the uniform federal policy of robust union and employer speech during organizing campaigns, and it intrudes on a core function of the Board. It is therefore preempted.

ARGUMENT

THE NLRA PREEMPTS CALIFORNIA'S STATUTE PROHIBITING EMPLOYERS FROM USING STATE GRANT AND PROGRAM FUNDS TO EXPRESS VIEWS REGARDING UNIONIZATION

It has long been recognized that a state law that stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 240 (1967) (internal quotation marks omitted). In applying that principle in the labor-relations context, this Court has developed two distinct but complementary preemption doctrines, the *Garmon* and *Machinists* doctrines. Because A.B. 1889 regulates both speech that Congress intended be left unregulated and speech that Congress intended the Board alone to regulate, it is preempted under both doctrines.

A. A.B. 1889 Is Preempted Under *Machinists* Because It Regulates Employer Speech That Congress Intended Be Left Unregulated

In silencing employers while permitting unions to speak to employees, A.B. 1889 tilts the balance in favor of unions during organizing campaigns, contrary to the general federal policy of non-interference with both union and employer speech. It is therefore preempted under the *Machinists* doctrine. In declining to find A.B. 1889 preempted under *Machinists*, the court of appeals manifested an exceedingly narrow and incorrect view of that doctrine.

1. The NLRA leaves unregulated most employer speech during organizing campaigns

The NLRA evidences a clear federal policy that employer speech during union organizing campaigns must generally be left unregulated. Congress decided that both unions and employers should be free to speak with employees about the advantages and disadvantages of unionization, and it added Section 8(c) to the NLRA to ensure that both unions and employers had "full freedom to express their views." S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947). As this Court has explained, in enacting Section 8(c), Congress intended to foster "uninhibited, robust, and wide-open" debate. *Linn*, 383 U.S. at 62 (internal quotation marks omitted).

Congress's policy choice reflects its view that robust debate assists employees in making informed choices about representation. See *Healthcare Ass'n of N.Y. State, Inc.* v. *Pataki*, 471 F.3d 87, 98-99 (2d Cir. 2006); *NLRB* v. *Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971). It also recognizes that an employer has an independent interest in conveying its views to employees during unionization drives, because the choice of a union places certain statutory obligations on, and may have significant economic consequences for, the employer. See, *e.g.*, *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962); *Tri-Cast, Inc.*, 274 N.L.R.B. 377, 377-378 (1985).

Under the NLRA, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union," so long as the communications do not contain a "threat of reprisal or force or promise of benefit." *Gissel Packing Co.*, 395 U.S. at 618. An employer may, for example, "point to a union's past failures and * * * use them to encourage employees to vote against

the union, just as a union may use its past success to encourage employees to support it." *Smithfield Foods, Inc.*, 347 N.L.R.B. No. 109 (Aug. 31, 2006), slip op. 2, aff'd *sub nom. UFCW Local 204* v. *NLRB*, 506 F.3d 1078 (D.C. Cir. 2007). An employer may also inform employees if certain customers are likely to react unfavorably to their choice of a union, see, *e.g.*, *TNT Logistics N. Am., Inc.*, 345 N.L.R.B. No. 21 (Aug. 26, 2005), slip op. 290-292, or if union tactics have previously harmed relationships with customers. See, *e.g.*, *Children's Ctr. for Behavioral Dev.*, 347 N.L.R.B. No. 3 (May 15, 2006), slip op. 1-3. Conversely, an employer may wish to express its view that a certain union has a track record of "responsible and intelligent" representation. *Coamo Knitting Mills, Inc.*, 150 N.L.R.B. 579, 581 n.2, 589, 595 (1964). There are thus myriad perspectives that an employer could offer its employees regarding unionization, and Congress has "firmly established" the employer's right to share those views. *Gissel Packing Co.*, 395 U.S. at 617.

Although debate regarding unionization "may well include vehement, caustic, and sometimes unpleasantly sharp attacks," *Linn*, 383 U.S. at 62 (internal quotation marks omitted), the Board has decided to "leave[] to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements." *Stewart-Warner Corp.*, 102 N.L.R.B. 1153, 1158 (1953); see *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964). By giving unions and employers wide latitude to express their views and respond to the other party's claims, the NLRA contributes to a sense of fairness during elections and reduces dilatory election-related litigation. See *Midland Nat'l Life Ins.*

Co., 263 N.L.R.B. 127, 131-133 (1982); see also *NLRB* v. *Magnavox*, 415 U.S. 322, 325 (1964).

2. A.B. 1889 is preempted because it restricts employer speech that Congress intended be left unregulated

A.B. 1889 impedes employers from expressing their views regarding unionization, directly contrary to Congress's judgment in the NLRA. It penalizes "any attempt" by an employer "to influence the decision of its employees" regarding "[w]hether to support or oppose" unionization. Cal. Gov't Code § 16645(a)(1). Although most employers are not entirely foreclosed from addressing election issues, any employer that receives grant funds or program funds in excess of $10,000 and engages in any type of communication or activity relating to union representation faces a significant risk of litigation and potential civil penalties. See *id.* §§ 16645.2(d), 16645.7(d), 16645.8. Moreover, entities that can trace all of their receipts to the State, such as several nursing homes and long-term-care facilities that are petitioners in this case, are entirely forbidden from expressing their views or engaging in advocacy efforts regarding unionization. See J.A. 152-154, 165-169, 298-302.

A.B. 1889's broad prohibition on employer speech is based on California's explicit policy judgment that employer speech for or against unionization "interfere[s] with an employee's choice about whether to join or to be represented by a labor union." 2000 Cal. Stat. ch. 872, § 1. That policy stands in stark contrast to Congress's determination, expressed in Section 8(c) of the NLRA, that employer speech enhances employee free choice and contributes to fair elections. See pp. 12-14, *supra*.

Moreover, although A.B. 1889 purports to take a position of neutrality, the statute is far from neutral in its application. A.B. 1889 disrupts the balance struck in the NLRA by impairing speech by employers during union organizing drives, while imposing no restraints on speech by unions, in clear conflict with federal policy. See, *e.g.*, 93 Cong. Rec. 4143 (1947) (in Section 8(c), "the right of employers to express their opinions in labor disputes is made coextensive with the rights which labor unions enjoy") (statement of Sen. Ellender).

A.B. 1889 does not even apply its constraints on employer speech uniformly. Rather than forbidding use of state funds for *all* employer advocacy regarding unionization, A.B. 1889 permits use of state funds for *select* employer advocacy activities that are favored by the State. For example, A.B. 1889 allows employers to use funds received from the State to grant recognition voluntarily without a secret-ballot election, thereby weakening the safeguard that the Board has determined (see pp. 2-3, *supra*) best protects employee free choice with respect to union representation. See Cal. Gov't Code § 16647(d). By encouraging regulated employers to grant recognition without an election, while making it difficult or impossible for them to participate meaningfully in an election if one is held, A.B. 1889 further upsets the balance struck by the NLRA and denies employers "'a weapon that Congress meant [them] to have available.'" *Machinists*, 427 U.S. at 150 (citation omitted).

In the short time since its enactment, A.B. 1889 has already had a significant effect on labor relations in California. Almost immediately, "unions began writing to the California Attorney General's office, alleging violations of the statute in an effort to coerce employers to

abstain from distributing literature, retaining consultants and legal counsel, or otherwise communicating with employees about the advantages and disadvantages of employment in a union shop." Pet. App. 46a (Beezer, J., dissenting); see, *e.g.*, J.A. 170-183. One union, for example, "alleged a violation of the statute, with little factual support, but offered to 'settle' the alleged violation if the employer agreed to enter into a neutrality agreement with the union." Pet. App. 46a (Beezer, J., dissenting). At the same time, the state Attorney General has aggressively enforced A.B. 1889. See, *e.g.*, J.A. 149-151. The record thus makes clear that A.B. 1889 has permitted unions to "gain a special advantage in labor disputes" in California. Pet. App. 46a (Beezer, J., dissenting).

A.B. 1889 seeks to advance California's stated position favoring employer neutrality on the subject of unionization, a position that is contrary to the policy expressed in Section 8(c) of the NLRA, which refuses to put such a thumb on the scales. By using its spending power to discourage advocacy by employers during unionization drives, California has upset "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor*, 507 U.S. at 226 (internal quotation marks omitted). A.B. 1889 is therefore preempted under the *Machinists* doctrine.

3. *The court of appeals' proffered grounds for distinguishing* Machinists *are unpersuasive*

a. The court of appeals erred in concluding that A.B. 1889 "do[es] not interfere with an employer's ability to engage in 'self-help'" because the employer "retains the freedom to spend its own funds however it wishes." Pet.

App. 17a. A.B. 1889 wholly precludes some entities from exercising their Section 8(c) rights to communicate with their employees regarding unionization. See, *e.g.*, J.A. 152-154. And A.B. 1889 has considerably more than an "incidental" effect (Pet. App. 18a & n.10) on employers that receive funds from sources other than the State. Any time such an employer communicates about or engages in any other activities related to unionization, it risks triggering a state investigation and state-court litigation instigated by the State or by private parties. That litigation could result in substantial financial liability whenever the employer fails to show that "state" funds were not used for unionization-related activities, or has commingled other funds with moneys received from the State. See Cal. Gov't Code §§ 16645.2, 16645.7, 16645.8. Several employers have already felt the effects of A.B. 1889, as labor unions have begun taking full advantage of A.B. 1889's broad applicability and punitive sanctions. See pp. 15-16, *supra*.

Contrary to the court of appeals' suggestion (Pet. App. 17a), employers are not free under A.B. 1889 to spend their "own funds" as they wish, because A.B. 1889's limitations on employer speech are not limited to state grants, but continue to apply to "state" funds even after those funds have been paid by the State to program participants in exchange for services rendered. See pp. 32-33, *infra*. Thus, the State seeks to advance its labor policy views not only through funds it has gratuitously provided but also through funds for which the State has already received fair value in exchange. The State's labor policy, of course, expressly conflicts with the policy embraced by Congress, and so must yield.

b. The court of appeals likewise erred in deeming *Machinists* inapplicable on the ground that "employer

speech in the context of organizing" is not a "zone[] of activity" that Congress left free from "*all* regulation." Pet. App. 19a; see also *id.* at 21a. *Machinists* preemption operates within a framework of extensive Board regulation of numerous aspects of the management-labor relationship. If *Machinists* preemption only operated with respect to categories of conduct devoid of any regulation, it would have little scope. In reality, *Machinists* applies in areas in which Congress has broadly defined protected and unprotected activities and has empowered the Board to define the contours of those activities, as long as the "particular activity" at issue is an activity that Congress has "deemed privileged against state regulation." 427 U.S. at 141 (citation omitted).

In *Machinists* itself, for example, this Court held that state law was preempted even though the general "zone of activity" at issue—the use of economic weapons in labor disputes—was the subject of extensive regulation under the NLRA. Congress had proscribed the use of some economic weapons, left others unregulated, and authorized the Board to draw lines consistent with the statute. See 29 U.S.C. 158(b)(4); *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960). The *particular* economic weapon at issue, however—a concerted refusal to work overtime aimed at pressuring an employer in a collective bargaining dispute—had been left *unregulated*, and therefore could not be regulated by the States without impermissibly "'denying one party to an economic contest a weapon that Congress meant him to have available.'" *Machinists*, 427 U.S. at 150 (citation omitted); see *id.* at 142-151; see also *Garner*, 346 U.S. at 499-500 ("The detailed prescription of a procedure for restraint of specified types of picketing would seem to

imply that other picketing is to be free of other methods and sources of restraint. * * * For a state to impinge on the area of labor combat designed to be free is * * * an obstruction of federal policy.").

Congress made a similar determination in the context of union and employer speech during organizing campaigns, deciding that the vast majority of speech must remain unregulated, while authorizing the Board to demarcate the narrow zone of regulation required to ensure free and fair elections. The court of appeals therefore erred, and departed from this Court's precedents, in holding that *Machinists* does not apply here.

c. The court below also erred in deeming *Machinists* principles inapplicable on the ground that Congress has, in limited contexts, restricted entities receiving federal funds from spending those funds on union-related activities. See Pet. App. 20a. Pointing out Congress's authority to modify broad federal policy to tailor it to specific contexts does little to strengthen the claim of the States to avoid the preemptive force of federal laws. Cf. U.S. Const. Art. VI, Cl. 2. Unlike the States, Congress has authority to create tailored exceptions to otherwise applicable federal labor policies, and (also unlike the States) it can do so in a manner that preserves national uniformity without creating the risk of a 50-State patchwork of inconsistent labor policies. The fact that Congress has chosen to impose targeted federal restrictions on employer speech regarding unionization in certain limited contexts thus does not suggest that the States are somehow vested with authority to have their own disparate policy views override federal labor policy in other settings. If anything, those context-specific federal restrictions only underscore that this is an area in which federal law is controlling. Indeed, if Congress

had intended to permit *state*-law departures from the general federal policy favoring robust employee speech, it would have said so explicitly. Compare *Golden State Transit Corp.* v. *City of L.A.*, 475 U.S. 608, 617 (1986) (no evidence that Congress contemplated state regulation), with *De Veau* v. *Braisted*, 363 U.S. 144, 154-155 (1960) (permitting state regulation where "Congress expressly gave its consent" to such regulation).

In purpose and effect, moreover, A.B. 1889 is more directly at odds with federal labor policy than the cited federal statutes. None of those statutes is government-wide in scope, and none is directed solely at prohibiting the use of funds to assist, promote, or deter union organizing; instead, they authorize grants or payments for specific purposes and then provide illustrations of activities that are not germane to those purposes. They represent a balancing of competing objectives for specific federal programs, not a government-wide frontal assault on existing federal labor policy. See, *e.g.*, Workforce Investment Act, 29 U.S.C. 2852, 2854(b)(4), (c)(6)(B) and (C), 2864, 2931(b)(7), (c), (d)(1), (d)(2) and (e), 2938(a)(3) (authorizing grants for job training and related activities but limiting spending to specified programs and activities and specifying various prohibited uses of funds); National and Community Service Act, 42 U.S.C. 12521-12526, 12530, 12571-12576, 12584(a), 12634 (authorizing grants for qualifying national and community service programs and delineating restrictions on uses of funds); Head Start Act, 42 U.S.C. 9833-9835, 9839-9840 (2000 & Supp. IV 2004) (establishing program to promote school readiness for low-income children and imposing restrictions on how funds may be used); Medicare Act, 42 U.S.C. 1395d-1395g, 1395k-1395n, 1395x(v) (2000 & Supp. IV 2004) (establishing health care pro-

grams for elderly and disabled citizens and specifying numerous limitations on reimbursable costs).

Moreover, none of the cited federal statutes contains express pro-unionization exemptions like those included in A.B. 1889. See Cal. Gov't Code § 16647. The limited restrictions in certain federal programs thus provide no basis for States to intrude on the exclusive federal labor-relations scheme in other contexts where Congress has authorized no such intrusions.

B. A.B. 1889 Is Preempted Under *Garmon* Because It Regulates Speech Prohibited Under The NLRA And Intrudes On The Board's Exclusive Primary Jurisdiction

A.B. 1889 is also preempted under *Garmon* because, in addition to regulating employer speech that Congress deliberately left unregulated, it regulates coercive or prejudicial employer speech for reasons of labor policy, a function that Congress assigned exclusively to the Board.

1. The NLRA prohibits certain speech and entrusts enforcement of that prohibition to the Board

Although Congress has generally decided that employer speech regarding unionization should be unregulated, it has recognized that regulation may be required in certain circumstances to protect employee free choice and ensure fair elections, and it has entrusted that regulation to the Board. First, Congress prohibited coercive employer speech as an unfair labor practice under Section 8 of the NLRA. See 29 U.S.C. 158(a)(1) (unfair labor practice for employer to "coerce employees in the exercise of the rights guaranteed in [Section 7]"); 29 U.S.C. 158(c) (employer's "expressi[on] of any views, argument, or opinion" protected from challenge only if it "contains no threat of reprisal or force or promise of

benefit"). For example, although an employer may "tell [employees] what he reasonably believes will be the likely economic consequences of unionization," he may not make "'threats of economic reprisal to be taken solely on his own volition.'" *Gissel Packing Co.*, 395 U.S. at 619 (citation omitted).

In Section 9 of the NLRA, moreover, Congress authorized the Board to regulate speech that may prejudice a representation election. See 29 U.S.C. 159. The Board may regulate election-related speech that "creates an atmosphere which renders improbable a free choice," even if the speech "may not constitute an unfair labor practice." *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948). For example, an employer may not "express his anti-union views to the employees on the day before the election" by "br[inging] [them] to his own office in some 25 groups of 20 to 25 individuals" or "instruct [his] foremen to propagandize employees in their homes." *Ibid.* More generally, the Board has long administered time, place, and manner restrictions that bar employer and union campaign activities in the vicinity of the polls or during the final hours before an election. See, *e.g.*, *Michem, Inc.*, 170 N.L.R.B. 362, 362-363 (1968); *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429-430 (1953).

Congress committed regulation of coercive and prejudicial speech regarding unionization to the Board. The Board has the exclusive responsibility for administering the unfair-labor-practice provisions of the NLRA, see 29 U.S.C. 160(a), as well as the exclusive authority for overseeing representation elections and certifying election results, see 29 U.S.C. 159. The Board strives to preserve a careful balance that seeks to deter coercive and prejudicial actions without chilling the open robust debate that Congress has embraced. Preserving that bal-

ance can require drawing fine lines, and that line-drawing is solely a function for the Board. See *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946). There is no place in the NLRA's comprehensive regulatory scheme for state regulation of employer speech to effectuate state labor policy.

2. A.B. 1889 is preempted because it interferes with the Board's jurisdiction over coercive or prejudicial employer speech regarding unionization

Garmon preemption precludes States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits," *Gould*, 475 U.S. at 286, in order to avoid "conflict with a complex and interrelated federal scheme of law, remedy, and administration" set forth in the NLRA. *Garmon*, 359 U.S. at 243. *Garmon* preemption principles apply to A.B. 1889 because the only employer speech reached by A.B. 1889 that Congress did not exempt from regulation is coercive or prejudicial employer speech during organizing campaigns, and Congress assigned regulatory oversight of such speech to the Board.

A.B. 1889 regulates a broad swath of employer speech regarding unionization—including speech that falls close to, and on either side of, the line drawn by the NLRA—in order to advance California's goal of preventing regulated employers "from seeking to influence employees to support or oppose unionization." 2000 Cal. Stat. ch. 872, § 1. A.B. 1889 also subjects regulated employers to the substantial risk and burden of state investigation, private suits, treble damages, and attorney's fee awards in the event of a violation. See Cal. Gov't Code §§ 16645.2, 16645.7, 16645.8.

A.B. 1889's regulation of employer speech compels state courts to usurp the functions of the Board. The Board has "exclusive primary competence," *Garmon*, 359 U.S. at 245, to distinguish coercive speech that violates Section 8(a)(1) or is prejudicial to a fair election, see *Gissel Packing Co.*, 395 U.S. at 620; *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948), from non-coercive speech that enhances employee free choice and is therefore immune from regulation, see 29 U.S.C. 158(c); *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964). A.B. 1889 requires state courts to penalize certain employer speech regarding unionization and impose different remedies from those provided in the NLRA. Under the uniform federal standard, only employer speech that coerces employees or prejudices elections may be regulated. See pp. 21-23, *supra*. Under A.B. 1889, by contrast, all advocacy by covered employers regarding unionization is regulated—albeit on a different axis, namely source of funds—on the theory that it inherently interferes with employee free choice. See 2000 Cal. Stat. ch. 872, § 1.

Sanctions for violations of the NLRA are entirely remedial, see *Gould*, 475 U.S. at 288 n.5, and include re-running a tainted election, directing an employer to cease and desist from an unfair labor practice, and posting appropriate remedial notices to employees. See, *e.g.*, *National By-Products, Inc.* v. *NLRB*, 931 F.2d 445, 447-448, 450-452 (7th Cir. 1991). Sanctions for violations of A.B. 1889, on the other hand, are punitive in nature. See Cal. Gov't Code §§ 16645.2(d), 16645.7(d), 16645.8. As this Court recognized in *Gould*, "'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,'" and the States are therefore barred "from providing their own regulatory or judicial reme-

dies for conduct prohibited or arguably prohibited by the Act." *Id.* at 286 (citation omitted).

The court of appeals suggested (Pet. App. 28a) that suit under A.B. 1889 would not interfere with the Board's jurisdiction because the only issue would be "whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA." That suggestion overlooks the fact that A.B. 1889 penalizes employers based on the policy judgment that all employer speech regarding unionization interferes with employee free choice, a judgment contrary to the NLRA. Further, the subject matter of all suits under A.B. 1889 is an employer's expression of its views regarding unionization, and Congress has determined that such speech, if regulated at all, is to be regulated exclusively by the Board.

To be sure, the case for *Garmon* preemption would be even stronger if California law imposed a test of coercion different from the federal test or imposed different sanctions solely because the federal test was satisfied. But because much of A.B. 1889 is preempted under *Machinists* principles, a state court considering an A.B. 1889 claim would have to attempt to discern whether employers engaged in coercive or prejudicial speech (or to use the court of appeals' phrase, "violated the NLRA") as part of the preemption analysis—the same analysis undertaken by the Board. That is, before a state court could conclude that certain employer speech could be penalized under A.B. 1889 consistent with *Machinists*, the court would have to first conclude that the speech at issue does not fall within the category of speech that Congress intentionally left unregulated, *i.e.*, it would have to conclude that the speech was coercive or prejudicial. Any attempt by a state court to perform

that function would intrude on the jurisdiction of the Board and upset the federal remedial scheme.

Accordingly, to whatever extent it is not preempted by *Machinists*, A.B. 1889 is preempted under *Garmon*, because it regulates employer speech that the NLRA "prohibits, or arguably * * * prohibits," *Gould*, 475 U.S. at 286, and intrudes on the Board's jurisdiction to determine whether employer speech regarding union organizing is impermissible.

3. The court of appeals' proffered grounds for distinguishing Garmon *are unpersuasive*

a. The court of appeals erred in finding *Garmon* preemption principles inapplicable to A.B. 1889. First, the court incorrectly focused its attention on the question whether A.B. 1889 regulates employer speech that is protected or affirmatively authorized by the NLRA. Pet. App. 23a-24a (rejecting *Garmon* preemption because "[S]ection 8(c) does not *grant* employers speech rights"); see *Linn*, 383 U.S. at 62 n.5. Regardless of whether Section 8(c) can be read to "grant" employers speech rights within the meaning of *Garmon*, it is clear that Section 8 prohibits coercive employer speech, see, *e.g.*, *Gissel Packing Co.*, 395 U.S. at 619, and that Congress gave the Board the exclusive responsibility for enforcing that prohibition. See 29 U.S.C. 160. Congress also gave the Board the authority to regulate prejudicial speech as part of its exclusive responsibility for overseeing representation elections under Section 9 of the NLRA. See pp. 22-23, *supra*. By permitting state courts to punish speech during representation elections, A.B. 1889 impermissibly intrudes on the jurisdiction of the Board and thus is preempted. See *New York Tel. Co.* v. *New York State Dep't of Labor*, 440 U.S.

519, 528 (1979) ("The overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress * * * demands that the [Board's] primary jurisdiction be protected.").

b. The court of appeals also erred in finding that California's exercise of its spending power falls within the recognized exception to *Garmon* preemption for conduct that is "deeply rooted in local feeling and responsibility." Pet. App. 30a-31a (quoting *Garmon*, 359 U.S. at 243-244). In each of the cases applying that exception, the conduct being regulated by the State—defamatory speech, violence, trespass, obstruction of access to property, intentional infliction of emotional distress—was tortious or criminal conduct that constitutes a traditional core concern of state law. See *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 207 (1978); *Farmer* v. *United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 302-306 (1977); *Linn*, 383 U.S. at 63-641; *International Union, UAW* v. *Russell*, 356 U.S. 634, 644-646 (1958); *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 139-140 (1957).

In contrast, A.B. 1889 is premised on the State's desire to regulate labor relations, not a concern about protecting its citizens from tortious or criminal conduct. And even assuming *arguendo* that a State's interest in protecting the public fisc could satisfy the "local feeling" exception, A.B. 1889 does not further that interest. See pp. 29-30, 32-33, *infra*; see also *Gould*, 475 U.S. 289. Indeed, A.B. 1889 is the type of targeted state labor-relations law to which *Garmon* preemption principles apply with their "greatest force." *Sears*, 436 U.S. at 193; see *id.* at 197 n.27.

In addition, the "local feeling" exception to *Garmon* applies only if the "harm to the regulatory scheme established by Congress" is outweighed by "the importance of the asserted cause of action to the State as a protection to its citizens," *Local 926, Int'l Union of Operating Eng'rs* v. *Jones*, 460 U.S. 669, 676 (1983). While in many contexts the proper weighing of those factors might prove less than self-evident, cf. *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment), here the State's asserted interest in furthering its own labor policy causes the balance to tilt strongly in favor of preemption. A.B. 1889 intrudes on the core concerns of the NLRA and core functions of the Board, without furthering any concomitant state interest in public safety. See *Sears*, 436 U.S. at 196-197 (requiring "a significant state interest in protecting the citizen from the challenged conduct" in order to permit state adjudication of a practice arguably within the Board's jurisdiction).[2]

C. The State's Use Of Its Spending Power Does Not Save A.B. 1889 From Preemption

The court of appeals correctly recognized that A.B. 1889 is regulatory, not proprietary, in nature. Yet it

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[2] The court of appeals erred in relying on *Sears* to reject *Garmon* preemption, because unlike the generally applicable state trespass law at issue in *Sears*, 436 U.S. at 188, A.B. 1889 is a targeted state labor-relations law which poses an acute threat to the Board's jurisdiction, see *id.* at 193 & n.21, 197 n.27, without furthering any "significant state interest in protecting [its] citizen." *Id.* at 196-197. Moreover, while this Court found "no risk of overlapping jurisdiction" in *Sears*, 436 U.S. at 201, here, a California court adjudicating an A.B. 1889 claim would consider the same question that Congress entrusted exclusively to the Board (*i.e.*, whether certain employer speech is subject to regulatory burdens). See pp. 25-26, *supra*.

exempted A.B. 1889 from preemption on the ground that a State may control the use of its own funds. That reasoning was erroneous. Although a State may allocate funds for a particular purpose and ensure that the funds are spent only for that purpose, A.B. 1889 is not such a law.

1. California is not acting as a "market participant"

In considering claims of NLRA preemption, this Court has found certain government contract conditions that affect labor to be permissible when the government acts in a proprietary capacity as a "market participant." *Boston Harbor*, 507 U.S. at 227, 229-231. As this Court has explained, the distinction "between government as regulator and government as proprietor" is crucial, because "pre-emption doctrines apply only to state *regulation*." *Id.* at 227.

Here, the court of appeals correctly found (Pet. App. 11a) that A.B. 1889 is "regulatory" and is "not protected by the market participant exception." The statute's stated purpose and effect is to further a labor policy of selective employer silence regarding union organizing, a policy in direct conflict with federal labor policy. See 2000 Cal. Stat. ch. 872, § 1. As the court of appeals recognized, "The statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services" but instead indicates "a general state position * * * with regard to organizing" and a desire to limit "an employer's attempt to influence employee choice about whether to join a union." Pet. App. 11a-12a.[3]

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[3] The court of appeals was correct in recognizing that the statute furthers a general state position on employer speech rather than a

A.B. 1889 upsets the balance struck by the NLRA and applies regulatory pressure in favor of unionization by impeding or silencing employers who would speak about union organizing efforts, while allowing them to use funds received from the State for any other labor costs. For example, A.B. 1889 permits "state" funds to be spent on voluntary recognition agreements, see Cal. Gov't Code § 16647(d), despite an employer's right to require that representational disputes be resolved using a secret ballot. See 29 U.S.C. 159(c) and (e); see also pp. 2-3, *supra*. Moreover, "the essentially punitive rather than corrective nature" of A.B. 1889's comprehensive enforcement scheme underscores its regulatory goal. *Gould*, 475 U.S. at 288 n.5. As a state regulatory measure, A.B. 1889 is subject to the normal standards for *Machinists* and *Garmon* preemption, and, as discussed (see pp. 11-28, *supra*), it is preempted under those standards.[4]

A state regulatory measure cannot escape preemption merely because the State regulates through its spending power. In *Gould*, this Court determined that a state policy of refusing to purchase goods and services

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specific procurement goal, but the court clearly erred in describing that policy as one "of neutrality." Pet. App. 12a; see pp. 15-16, *supra*.

[4] Moreover, having correctly recognized that A.B. 1889 involves regulation, not the State's proprietary role as a market participant, the court of appeals erred in finding *Machinists* preemption inapplicable because the State's spending decisions are not controlled by market forces. The proper place to consider the relevance, if any, of the fact that A.B. 1889 takes the form of a restriction on spending is in the initial consideration of whether it falls within the market participant exception. Having correctly concluded that A.B. 1889 is in substance regulatory, the court of appeals erred in relying on "the state's choices of how to spend its funds" as a basis for rejecting *Machinists* preemption. Pet. App. 17a.

from three-time NLRA violators could not be justified as the action of a market participant when it "serve[d] plainly as a means of enforcing the NLRA." 475 U.S. at 287. The State's invocation of its spending power did not immunize its regulation from preemption, because the choice "to use its spending power rather than its police power d[id] not significantly lessen the inherent potential for conflict" between the state and federal schemes. *Id.* at 289. *Gould* thus teaches that States may not use their spending power in a manner "tantamount to regulation" of labor relations. *Ibid.* Even if the scope of regulation is limited to the use of state funds, such efforts impermissibly "detract[] from the 'integrated scheme of regulation' created by Congress" in the NLRA. *Id.* at 288-289.

Here, just as in *Gould*, the State has attempted to regulate labor relations using its spending power, through a statute that operates in a "rigid and undiscriminating manner," with sanctions that are "essentially punitive rather than corrective." 475 U.S. at 287-288 & n.5. And A.B. 1889 presents an even more stark conflict with federal labor policy than the statute in *Gould*, because it furthers a substantive policy that is contrary to the NLRA *and* imposes additional remedies for violations of the NLRA. See *id.* at 287. Thus, California's invocation of its spending power cannot save its regulation of labor relations from preemption. A.B. 1889 is plainly not an example of a "State act[ing] as a market participant with no interest in setting policy." *Boston Harbor*, 507 U.S. at 229. It is instead a state regulatory measure designed to advance California's chosen labor policies, and it must therefore be judged under the preemption standards applicable to such state regulation. *Id.* at 227.

2. A.B. 1889 is not saved from preemption as a state effort to fund only a particular program

a. Although a State has a legitimate proprietary interest in ensuring that state funds appropriated for a proper purpose are spent in accordance with that purpose, A.B. 1889's restrictions are not of that type. Rather than adopting a neutral affirmative requirement that grant funds may be spent solely for the purposes of the relevant grant program, A.B. 1889 imposes only a negative restriction on the use of funds for employer speech regarding union representation and allows funds to be spent for any other labor costs besides the costs of employer speech regarding union representation. A.B. 1889's grant restrictions operate in a regulatory fashion by targeting a particular category of disfavored employer speech for state-labor-policy reasons, and thus they cannot "even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S. at 291.

A.B. 1889's restrictions on state program participants also extend beyond any arguably legitimate proprietary interest. For example, California's Medi-Cal program includes detailed rules specifying which costs the State views as reimbursable, ensuring that California reimburses long-term-care providers only for those expenses. See J.A. 243-245, 248-254. A.B. 1889 goes beyond those restrictions by regulating how service providers may use funds received from the State—even after the service has been provided and the funds can no longer be considered "state funds":

> While A.B. 1889 regulates the manner in which Medi-Cal providers may spend state funds, it does not govern which expenditures are used to determine

> the prospective reimbursement rates ultimately set by the state for different classes of Medi-Cal providers statewide. The latter is instead governed by the cost reporting requirements of the State Medicaid Plan.

J.A. 331-332. California has no legitimate *proprietary* interest in controlling what a healthcare provider does with reimbursement payments it has earned by providing covered medical services.

b. Although the court of appeals recognized A.B. 1889's clear regulatory purpose, it found that the statute was not preempted because (in its view) A.B. 1889 does not violate the First Amendment. Pet. App. 32a-35a. Regardless of whether A.B. 1889 violates the First Amendment (an issue that the parties agreed was not presented below, see J.A. 352-353), the question here is a distinct one, namely, whether California's restrictions on employer advocacy regarding unionization impermissibly conflict with federal labor policy and the exclusive jurisdiction of the Board. On that question, the answer is clear. Although a State may "choose[] to fund a program dedicated to advance certain permissible goals," *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991), it is not "permissible" for a State to regulate labor relations in a manner contrary to the comprehensive federal scheme. See *Gould*, 475 U.S. at 290 ("[W]e cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration,' under the NLRA as long as they did so through exercises of the spending power." (citation omitted)); *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 145 (1971) ("The Board is the sole protector of the 'national interest' defined with particularity in the Act.").

Furthermore, A.B. 1889 cannot plausibly be characterized as a "prohibition on a project grantee * * * from engaging in activities outside of the project's scope." *Rust*, 500 U.S. at 194. A.B. 1889 does not provide that funds allocated for a given purpose may be spent only on that purpose; instead, it permits employers to spend state funds on any type of labor-related costs except employer speech during organizing campaigns (and also permits certain expenditures favoring unionization). See pp. 29-33, *supra*.

Federal law accords a well-warranted respect to a State's sovereignty over its own fisc, but the limit of that respect is exceeded when the State seeks to impose regulatory restraints that conflict with fundamental objectives of federal law. The NLRA's policy of employee free choice with respect to selection of a collective bargaining representative is too fundamental to the comprehensive federal scheme to permit States to attach incompatible conditions that frustrate "congressional intent to encourage free debate on issues dividing labor and management," *Linn*, 383 U.S. at 62.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2008

STATUTORY APPENDIX

1. Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

2. Section 8 of the National Labor Relations Act, 29 U.S.C. 158, provides, in pertinent part:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

3. Section 9 of the National Labor Relations Act, 29 U.S.C. 159, provides:

Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of represen tation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predeces-

sor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be in-

cluded in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

4. Section 10 of the National Labor Relations Act, 29 U.S.C. 160, provides, in pertinent part:

Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may

be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

* * * * *

5. California Government Code § 16645 (West Supp. 2008) provides:

Definitions

For purposes of this chapter, the following terms have the following meanings:

(a) "Assist, promote, or deter union organizing" means any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following:

(1) Whether to support or oppose a labor organization that represents or seeks to represent those employees.

(2) Whether to become a member of any labor organization.

(b) "Employer" means any individual, corporation, unincorporated association, partnership, government

agency or body, or other legal entity that employs more than one person in the state.

(c) "State contractor" means any employer that receives state funds for supplying goods or services pursuant to a written contract with the state or any of its agencies. "State contractor" includes an employer that receives state funds pursuant to a contract specified in paragraph (2) of subdivision (d). For purposes of this chapter, the contract shall be deemed to be a contract with a state agency.

(d)(1) "State funds" means any money drawn from the State Treasury or any special or trust fund of the state.

(2) "State funds" includes any money appropriated by the state and transferred to any public agency, including a special district, that is used by the public agency to fund, in whole or in part, a service contract in excess of two hundred fifty thousand dollars ($250,000).

(e) "State property" means any property or facility owned or leased by the state or any state agency.

6. California Government Code § 16645.1 (West Supp. 2008) provides:

Prohibition; requests for reimbursements; records; violations; penalties

(a) No state funds shall be used to reimburse a state contractor for any costs incurred to assist, promote, or deter union organizing.

(b) Every request for reimbursement from state funds by a state contractor shall include a certification that the contractor is not seeking reimbursement for costs incurred to assist, promote, or deter union organizing. A state contractor that incurs costs to assist, promote, or deter union organizing shall maintain records sufficient to show that no reimbursement from state funds has been sought for those costs. The state contractor shall provide those records to the Attorney General upon request.

(c) A state contractor is liable to the state for the amount of any funds obtained in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

(d) This section does not apply to a fixed-price contract or to any other arrangement by which the amount of the payment of state funds does not depend on the costs incurred by the state contractor.

7. California Government Code § 16645.2 (West Supp. 2008) provides:

Grant recipients; accounting for use of state funds; violations; penalties

(a) The recipient of a grant of state funds, including state funds disbursed as a grant by a public agency, shall not use the funds to assist, promote, or deter union organizing.

(b) For purposes of this section, each recipient of a grant of state funds shall account for those funds as follows:

(1) State funds designated by the grantor for use for a specific expenditure of the recipient shall be accounted for as allocated to that expenditure.

(2) State funds that are not designated as described in paragraph (1) shall be allocated on a pro rata basis to all expenditures by the recipient that support the program for which the grant is made.

(c) Prior to the disbursement of a grant of state funds, the recipient shall provide a certification to the state that none of the funds will be used to assist, promote, or deter union organizing. Any recipient that makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that state funds have not been used for those expenditures. The grant recipient shall provide those records to the Attorney General upon request.

(d) A grant recipient is liable to the state for the amount of any funds expended in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

8. California Government Code § 16645.3 (West Supp. 2008) provides:

State contractors; prohibitions; service contracts for state or state agencies; violations; penalties

(a) No state contractor shall assist, promote, or deter union organizing by employees who are performing work on a service contract, including a public works contract, for the state or a state agency.

(b) A state contractor that violates subdivision (a) is liable for a civil penalty of one thousand dollars ($1,000) per employee per violation.

9. California Government Code § 16645.4 (West Supp. 2008) provides:

State contractors in receipt of state funds in excess of a certain amount pursuant to contracts with state or state agencies; prohibition; records; violations; penalties

(a) A state contractor that receives state funds in excess of fifty thousand dollars ($50,000) pursuant to a contract with the state or a state agency shall not use those state funds to assist, promote, or deter union organizing during the life of the contract, including any extensions or renewals of the contract. The dollar threshold in this subdivision, however, does not limit the application of other provisions of this chapter that restrict the use of state funds.

(b) All contracts in excess of fifty thousand dollars ($50,000) and that are awarded by the state or a state agency shall contain the prohibition stated in subdivision (a).

(c) A state contractor who is subject to subdivision (a) and who makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that no state funds were used for those expenditures. The state contractor shall provide those records to the Attorney General upon request.

(d) A state contractor is liable to the state for the amount of any funds expended made in violation of sub-

division (a) plus a civil penalty equal to twice the amount of those funds.

10. California Government Code § 16645.5 (West Supp. 2008) provides:

Employers conducting business on state property pursuant to contracts or concession agreements; meeting prohibitions; violations; penalties

(a) An employer conducting business on state property pursuant to a contract or concession agreement with the state or a state agency, or a subcontractor on such a contract or agreement, shall not use state property to hold a meeting with any employees or supervisors if the purpose of the meeting is to assist, promote, or deter union organizing. This section does not apply if the state property is equally available, without charge, to the general public for holding a meeting.

(b) An employer that violates subdivision (a) shall be liable to the state for a civil penalty equal to one thousand dollars ($1,000) per employee per meeting.

11. California Government Code § 16645.6 (West Supp. 2008) provides:

Public employers receiving state funds; prohibition; violations

(a) A public employer receiving state funds shall not use any of those funds to assist, promote, or deter union organizing.

(b) Any public official who knowingly authorizes the use of state funds in violation of subdivision (a) shall be liable to the state for the amount of those funds.

12. California Government Code § 16645.7 (West Supp. 2008) provides:

Private employers receiving state funds in excess of a certain amount; certification requirements; records; violations; penalties

(a) A private employer receiving state funds in excess of ten thousand dollars ($10,000) in any calendar year on account of its participation in a state program shall not use any of those funds to assist, promote, or deter union organizing.

(b) As a condition of participating in a state program pursuant to which it will receive state funds in excess of ten thousand dollars ($10,000) in any calendar year, a private employer shall provide a certification to the state that none of those funds will be used to assist, promote, or deter union organizing.

(c) A private employer who is subject to subdivision (a) and who makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that no state funds were used for those expenditures. The private employer shall provide those records to the Attorney General upon request.

(d) A private employer is liable to the state for any funds expended in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

13. California Government Code § 16645.8 (West Supp. 2008) provides:

Prosecution of civil actions; notice requirements; intervention; attorney's fees and costs

(a) A civil action for a violation of this chapter may be brought by the Attorney General, or by any state taxpayer, on behalf of the people of the State of California, for injunctive relief, damages, civil penalties, and other appropriate equitable relief. All damages and civil penalties collected pursuant to this chapter shall be paid to the State Treasury.

(b) Before filing an action under this section, a taxpayer shall give written notice to the Attorney General of the alleged violation and the intent to bring suit. If the Attorney General commences a civil action for the same alleged violation within 60 days of receiving the notice, a separate action by the taxpayer shall be barred.

(c) A taxpayer may intervene as a plaintiff in any action brought under this section.

(d) A prevailing plaintiff in any action under this section is entitled to recover reasonable attorney's fees and costs. A prevailing taxpayer intervenor who makes a substantial contribution to an action under this section is entitled to recover reasonable attorney's fees and costs.

14. California Government Code § 16646 (West Supp. 2008) provides:

Treatment of expenditures; accounting for expenditures

(a) For purposes of this chapter, any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity.

(b) For purposes of accounting for expenditures, if state funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between state funds and other funds on a pro rata basis.

15. California Government Code § 16647 (West Supp. 2008) provides:

Exemptions

This chapter does not apply to an activity performed, or to an expense incurred, in connection with any of the following:

(a) Addressing a grievance or negotiating or administering a collective bargaining agreement.

(b) Allowing a labor organization or its representatives access to the employer's facilities or property.

(c) Performing an activity required by federal or state law or by a collective bargaining agreement.

(d) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.

16. California Government Code § 16648 (West Supp. 2008) provides:

Retroactive application

This chapter does not apply to an expenditure made prior to January 1, 2001, or to a grant or contract awarded prior to January 1, 2001, unless the grant or contract is modified, extended, or renewed after January 1, 2001. Nothing in this chapter requires employers to maintain records in any particular form.

17. California Government Code § 16649 (West Supp. 2008) provides:

Severability

The provisions of this chapter are severable. If any section or portion of this chapter, or any application thereof, is held invalid, in whole or in part, that invalidity shall not effect any other section, portion, or application that can be given effect.